STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 08 EHR 0771, 0779, 0835 & 0836
NORTH CAROLINA WASTE AWARENESS AND REDUCTION NETWORK, INC., APPALACHIAN VOICES, ENVIRONMENTAL DEFENSE FUND, NATIONAL PARKS CONSERVATION ASSOCIATION, SIERRA CLUB, SOUTHERN ALLIANCE FOR CLEAN ENERGY, CAPE FEAR RIVERKEEPER, CATAWBA RIVERKEEPER, FRENCH BROAD RIVERKEEPER, LOWER NEUSE RIVERKEEPER, NEW RIVERKEEPER, PAMLICO-TAR RIVERKEEPER, UPPER NEUSE RIVERKEEPER, WATAUGA RIVERKEEPER, WACCAMAW RIVERKEEPER and YADKIN RIVERKEEPER, Petitioners, v. N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF AIR QUALITY, Respondent, and DUKE ENERGY CAROLINAS, LLC, Intervenor-Respondent.	**RESPONDENT DAQ'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS CO_2 PSD CLAIM**

NOW COMES Respondent the Division of Air Quality of the North Carolina Department of Environment and Natural Resources ("DAQ"), by and through the undersigned counsel, and submits this reply memorandum, which

responds to the Petitioners' Memorandum in Response to DAQ's Memorandum in Support of Duke's Motion to Dismiss Petitioners' CO_2 PSD Claim ("Petitioners' Response").

ARGUMENT

In their Response, the Petitioners make two critical errors that undermine virtually their entire argument. First, the Petitioners suggest that DAQ's position is, either as a matter of fact or law, controlled by the decision of the Environmental Protection Agency ("EPA"), and by extension the federal Environmental Appeals Board ("EAB"),[1] in In re Deseret Power Elec. Coop., 14 E.A.D. __, PSD App. No. 07-03 (Envtl. App. Bd. Nov. 13, 2008). It is not. DAQ's position represents its own conclusions regarding the statute and rules and is not reliant on the Deseret decision. Further, the EAB's decisions are not binding precedent in States with fully approved Clean Air Act ("CAA") State implementation plans ("SIPs"), such as North Carolina.

Second, the Petitioners insist that DAQ's decision must be judged only by what is stated within the four corners of the document that constitutes the agency action (hereinafter the "Final Determination"). In fact, DAQ may rely in the Office of Administrative Hearings ("OAH") on any justification for its action. There is simply no such thing as a *post hoc* rationalization in OAH because the

[1] As discussed later, the EAB and EPA are one and the same for the purposes of the Petitioners' Prevention of Significant Deterioration ("PSD") claims.

final agency decisionmaker – the Environmental Management Commission ("EMC") – has not yet made a "final decision."

I. DAQ HAS AN APPROVED SIP; DAQ'S POSITION REGARDING THE PSD RULES IS NOT TIED TO EPA'S AND NOT CONTROLLED BY DESERET

The Petitioners' are incorrect that DAQ's permitting decision rises or falls with EPA's (and the EAB's) decision in Deseret. The Petitioners seem to contend that, as a matter of fact, DAQ simply relied on EPA's Deseret interpretation without making an independent decision. See, e.g., Pet'rs' Resp. at 4 (contending that DAQ's "sole justification" was based on the "putative EPA historical interpretation" discussed in Deseret); id. at 8 n.10 (contending that DAQ "adopt[ed] EPA's rationale in Deseret . . . ."). This is simply not the case.

In the Final Determination, DAQ discussed its position regarding the PSD program by referring to EPA's Deseret permitting decision. However, DAQ was not deferring to EPA. If that had been DAQ's intention, DAQ more easily could have announced that it was adopting EPA's interpretation by reference and ended at that. Instead, DAQ discussed EPA's opinion because EPA already had cogently explained the plain meaning of the rule. DAQ agreed with EPA and saw no need to "reinvent the wheel."

If there was any doubt whether DAQ reached its own conclusions in this case and is not merely standing on EPA's interpretation, DAQ made that plain in

its previous Memorandum. There, DAQ "respectfully disagree[d] with the EAB" (and by definition disagreed with EPA) regarding the clarity of the PSD rules. Respondent DAQ's Mem. of L. in Support of Mot. to Dismiss CO_2 PSD Claim ("DAQ Mem.") at 28 n.15. To be clear, DAQ not only disagrees with the EAB's conclusion regarding the plain language of the definition of "regulated NSR pollutant," but DAQ also submits that the EAB's analysis was legally erroneous.

The first step in any regulatory analysis is to discern whether the text of the rule itself is clear. E.g., Christensen v. Harris County, 529 U.S. 576, 588 (2000). If the regulation is clear on its face, there is no need to resort to other means of interpretation, such as reviewing the agency's practice. But in the first step of its analysis of the governing EPA rule, the EAB repeatedly relied on the fact that EPA's statements regarding the rule allegedly had not been consistent. E.g., Deseret, slip op. at 43 (stating the EAB's overall conclusion that "we are not persuaded that the Agency's statements regarding the regulatory definition have been sufficiently clear and consistent . . . ."). The EAB's analysis improperly mixed the two distinct steps. On the other hand, DAQ's textual analysis appropriately began and ended with the text of the rule. Therefore, DAQ's position is plainly not immutably tied to EPA's, and the EAB's interpretation is legally defective.

Because DAQ did not tether its decision to EPA's view, the decision in Deseret did not, as a matter of fact, undermine DAQ's decision.

Alternatively, the Petitioners repeatedly rely on the EAB's Deseret opinion in an apparent attempt to elevate it to the status of mandatory authority. The Petitioners' treatment of Deseret greatly overstates its importance in North Carolina because DAQ's actions are not controlled by the EAB's holdings.

The Petitioners exhibit a fundamental misunderstanding of the federal-State relationship under the CAA. As the United States Supreme Court recognized decades ago, in general the CAA sets certain minimum requirements, such as attaining and maintaining national ambient air quality standards, that the States must meet. How the States meet those standards is up to them. If EPA approves a State's SIP, the State retains significant latitude regarding its program and the interpretation and application of its rules. Train v. NRDC, 421 U.S. 60, 79 (1975). If not, the State simply acts as EPA's delegate and must abide by EPA's detailed programmatic decisions. See Greater Detroit Resource Recovery Auth. v. EPA, 916 F.2d 317, 320-21 (6th Cir. 1990).

The institution of the EAB itself exemplifies of this distinction. The EAB's authority is not derived from some independent statutory grant, but instead devolves directly from the EPA Administrator. As the Petitioners recognize, the Administrator has delegated her authority to decide appeals of PSD permits to the

EAB. Pet'rs' Resp. at 2 n.1. In States without approved SIPs, appeals of PSD permits go directly to the EAB because those PSD permits are essentially EPA permits, not State permits. This is how Michigan's PSD permit came before the EAB in In re N. Mich. Univ. Ripley Heating Plant ("NMU"), 14 E.A.D. __, PSD App. No. 08-02 (Envtl. App. Bd. Feb. 18, 2009).

In contrast, appeals of DAQ permits never go to the EAB. They proceed exclusively through the State's own administrative and judicial bodies, beginning in OAH. As the Missouri Court of Appeals cogently summarized:

> [T]he EAB has no authority to review any decision of the [State of Missouri] . . . applying Missouri statutes or regulations under Missouri's approved PSD program under its SIP. . . . [T]he decisions of the EAB in applying and interpreting federal environmental statutes and regulations . . . are not binding or controlling upon the [State of Missouri] . . . . or the courts of this State.

Chipperfield v. Mo. Air Conservation Comm'n, 229 S.W.3d 226, 242 (Mo. Ct. App. 2007). For this reason, the Petitioners' intimation that NMU extended Deseret to apply to all State permitting decision, Pet'rs' Resp. at 8 n.10, is hardly the case.

In December 2008, former EPA Administrator Johnson recognized that EPA's interpretation of the very PSD rules at issue here does not bind States with fully approved SIPs, such as North Carolina. Mem. from Stephen L. Johnson, Adm'r, EPA, to Reg'l Adm'rs, EPA, at 2 (Dec. 18, 2008) ("Johnson Memo"). In January 2009, current Administrator Jackson – in a letter that the Petitioners

themselves submitted as relevant authority – agreed that EPA's interpretation of the PSD rules does not control "approved" States. Ltr. from Lisa P. Jackson, Adm'r, EPA, to David Bookbinder, Sierra Club, at 1 (Feb. 17, 2009) ("Jackson Letter"). Because the EAB has no more authority than the Administrator, the EAB's decisions also are not mandatory authority in North Carolina. Indeed, it would be absurd for the EAB's decisions, including Deseret, to bind DAQ when DAQ's permitting decisions can never come before the EAB for review. The Petitioners' extensive reliance on Deseret and other EAB decisions is misplaced. Regardless, even if DAQ were required to abide by EPA's interpretation, the Johnson Memo is the prevailing interpretation, see DAQ Mem. at 30-31 – a fact that even Administrator Jackson recognized. Jackson Ltr. at 1 (specifically refusing to stay effectiveness of the Johnson Memo).

Moreover, the Petitioners' treatment of Deseret is inconsistent. When Deseret runs counter to the Petitioners, the Petitioners no longer interpose it with such force. Contrary to a main tenet of the Petitioners' position, the EAB "reject[ed] Sierra Club's argument that . . . the plain meaning of . . . [the statute] compels a particular interpretation of the phrase 'subject to regulation under this Act' for purposes of the PSD provisions of sections 165 and 169." Deseret, slip op. at 35. Although the Petitioners concede Deseret opposes their argument, Pet'rs' Resp. at 5 n.4, they never explain why the ALJ should abide by Deseret

when it favors them but disregard Deseret it when it is inconvenient to their position.[2]

Therefore, the Petitioners' arguments that Deseret, NMU, etc. pulled the rug out from under DAQ's decision are incorrect.

II. DAQ IS PERMITTED TO ADVANCE JUSTIFICATIONS BEFORE OAH THAT IT DID NOT STATE IN THE FINAL DETERMINATION

The Petitioners' allege that DAQ's Memorandum is a *post hoc* rationalization that the ALJ is not permitted to consider. This misconstrues the applicable principles of administrative law.

An agency engages in improper *post hoc* rationalization when it advances a new justification for its action for the first time on judicial review. "The ***courts*** may not accept ***appellate*** counsel's *post hoc* rationalizations for agency action . . . . [An agency's] order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself[.]" Burlington Truck Lines v. United States, 371 U.S.

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[2] Instead, the Petitioners attempt to pull language from Deseret to muddy the waters. In doing so, they misrepresent Deseret. The Petitioners argue that the EAB found that EPA's 1978 PSD rules were the "only relevant interpretation" of the statute and that the 1978 rules "auger[] in favor" of the Petitioners' view of the statute. However, although the EAB found that the 1978 rules should be well regarded, it did not find that those rules were the "only relevant interpretation." The EAB actually discussed several other relevant interpretations. Deseret, slip op. at 42-54. More importantly, the EAB never implied that the 1978 rules "auger[ed] in favor" of the Petitioners' reading of the CAA. The EAB indicated that the 1978 rules "auger[] in favor of a finding that, in 1978, the Agency interpreted 'subject to regulation under this Act' to mean 'any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type.'" Deseret, slip op. at 41. This has more to do with clarifying EPA's interpretation of the Act than it has to do with the Act itself, especially considering that the EAB expressly found that the Act was ambiguous. E.g., id. at 33 ("[T]he phrase 'subject to regulation under this Act' is not so clear and unequivocal as Sierra Club suggests.").

156, 168-69 (1962) (emphasis added). However, this case is not before the courts; it is still in the midst of the administrative process. Once a petition for contested case is filed, there is no "final decision" in the case until the EMC – the agency that the General Assembly specifically charged to issue air permits – reviews the record produced before the ALJ. See N.C. Gen. Stat. 150B-36. The EMC's "final decision" is the "order" upon which the agency's action "[must] be upheld . . . ." See Burlington Truck, 371 U.S. at 168-69. That is, DAQ's "interpretation of [its] regulations in an administrative adjudication . . . *is* agency action, not a *post hoc* rationalization of it." Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 157 (1991).

In Amanini v. NC DHR, 114 N.C. App. 668, 443 S.E.2d 114 (1994), the agency attempted to present a new justification for its action for the first time on judicial appeal. Prior to judicial review, the only place where this new theory had appeared was in the agency's prehearing statement. The Court of Appeals held that because the agency had never advanced this theory at any stage of the administrative process, including "before the administrative law judge," it was barred from doing so on appeal. Id. at 681, 443 S.E.2d at 122. Amanini clearly implies that had the agency actually litigated the new rationale before the ALJ, the *post hoc* bar would not have applied despite the agency's failure to disclose the theory before the case reached the ALJ.

The Petitioners cite no contradictory North Carolina statute or other authority, and the references upon which they rely are distinguishable. Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981), dealt with an agency litigation position first presented on ***judicial*** review. The case is inapposite. The Petitioners' reliance on two EAB decisions is also misplaced. The EPA operates under rules that specify that "[t]he record shall be complete on the date the final permit is issued." Deseret, slip op. at 19 (quoting 40 C.F.R. §124.18(c)). Thus, unlike in OAH, the EAB decides PSD permit decisions in an appellate capacity. "On appeal, the EAB reviews the record of the permit decision" as developed and completed by EPA. In re ConocoPhillips Co., 13 E.A.D. __, PSD Appeal No. 07-02, slip op. at 24 (Envtl. App. Bd. June 2, 2008). The EAB does not take evidence. In contrast, under North Carolina procedure the agency is permitted in OAH to present the full gamut of evidence, including expert testimony. There would be no reason for this complete trial practice if the agency action was to be adjudicated solely on the basis of the written record that existed prior to any petitions being filed. Therefore, North Carolina law allows DAQ to advance any theory before OAH to support its decision. The Petitioners' focus on the five relevant paragraphs of the Final Determination is far too narrow.[3] See Pet'rs' Resp. at 7-10.

[3] The Petitioners observe that DAQ argued that the Georgia court's analysis in Longleaf was brief, which weighed against its persuasiveness. From this, they suggest that the five paragraphs in the Final Determination are less persuasive because they are even shorter. This analysis again

Regarding the five paragraphs in the Final Determination, DAQ already has responded to much of the Petitioners' specific attacks. For example, DAQ discussed paragraph 1 in detail in its previous Memorandum and above. DAQ Mem. at 17-19; see p. 3 supra. And DAQ discussed Massachusetts v. EPA, 549 U.S. 497 (2007), in paragraphs 2 and 3 of the Final Determination to make the point that the Massachusetts decision, by itself, did not subject CO_2 to actual emission limitation. Massachusetts does not speak to the question of what "subject to regulation" means, see DAQ Mem. at 25; but it does demonstrate that once "subject to regulation" is understood to require actual emission limitations, CO_2 certainly does not come within the meaning of the phrase.[4]

This was confirmed again by EPA on April 17, 2009 in EPA's proposed response to the Massachusetts decision. In that document, "[p]ursuant to section 202(a) of the Clean Air Act . . ., the Administrator propose[d] to find that the mix of six key greenhouse gases [including CO_2] . . . may reasonably be anticipated to endanger public health and welfare." EPA, Proposed Endangerment & Cause or

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fails on the ground that DAQ is not limited to the arguments set forth in the Final Determination, but the power of the Longleaf decision to persuade the ALJ is limited to the Georgia trial court's Final Order.

[4] DAQ agrees with the Petitioners and the EAB that In re North County Res. Recovery Assocs., 2 E.A.D. 229, 230 (Adm'r 1986), cited in the Final Determination in paragraph 4, does not speak to what the phrase "subject to regulation" means. It was cited for the general principle that if a pollutant is not "subject to regulation" it falls outside the reach of BACT. Paragraph 5 of the Final Determination represents a conclusion that summarizes together the key concepts from the preceding paragraphs in the Final Determination.

Contribute Findings for Greenhouse Gases Under §202(a) of the CAA at 11.[5] This finding would obligate EPA to regulate emissions of CO_2 from mobile sources. However, Administrator Jackson again confirmed, explicitly deferring to the Johnson Memorandum, that even "a final positive endangerment finding would not make [greenhouse gases] . . . a regulated pollutant under the CAA's Prevention of Significant Deterioration (PSD) program" unless EPA first amends the Johnson Memorandum. Endangerment Proposal at 106 n.29.

In discussing the Final Determination, the Petitioners contend that PSD review is triggered based on a "lower threshold" of "any actual or potential adverse effect . . . ." Pet'rs' Resp. at 9. The CAA refutes this contention. The threshold for regulation is whether the pollutant is "subject to regulation under the Act." In conjuring this "lower threshold," the Petitioners attempt to supplant mandatory statutory language with a single phrase from the nonbinding "Congressional declaration of purpose" section of the PSD statutes. See id. (relying on 42 U.S.C. §7470(1) ("Congressional declaration of purpose")). The Petitioners' argument is not supported by the statute.[6]

[5] Available at http://epa.gov/climatechange/endangerment/downloads/GHGEndangerment Proposal.pdf (hereinafter "Endangerment Proposal").

[6] The Petitioners also complain of the extrinsic evidence to which DAQ referred in its Memorandum. DAQ clearly agreed previously that it "cannot submit evidence . . . at this stage of the litigation." DAQ Mem. at 20. DAQ referenced these facts only to ensure that the decision of the ALJ on the extant motion is appropriately framed. Id.

DAQ is permitted before OAH to rely on justifications outside the Final Determination. The Petitioners' attempt to limit the ALJ's review are contrary to law.

III. THE PETITIONERS' OTHER RESPONSES ARE INCORRECT AND/OR BESIDE THE POINT

A. Instead of Responding to DAQ's Arguments on the Merits, the Petitioners Unsuccessfully Attempt to Paint DAQ's Memorandum as Redundant

The Petitioners assert that DAQ's arguments repeat contentions already made by Duke and EPA (in the Deseret case). Even a cursory inspection of the relevant documents reveals that this is just not true. What follows is a partial listing of arguments urged by DAQ, none of which were pressed by Duke or EPA or discussed by the EAB:

- Congress used the word "regulation" in various places of the CAA outside the PSD section without imparting a consistent meaning to the term. DAQ Mem. at 14-15.

- The historical setting of the enactment of the PSD statute, a consideration specifically relevant under North Carolina case law, fails to lend clarity to the statute. Id. at 15.

- Congress used the phrase "subject to" in another part of the BACT provisions specifically to refer to actual pollution controls. Id. at 12.

- The definition of "regulated NSR pollutant" in 40 C.F.R. §51.166(b)(49) uses the word "standard," a term used throughout §51.166 consistently to refer to actual control of emissions, not monitoring and/or reporting requirements. Id. at 18.

Indeed DAQ takes a fundamentally different approach to this issue than does Duke. DAQ submits that the text of the statute is unclear – an issue not directly addressed by Duke – and that the language of the PSD rules is plain and unambiguous.[7] On the other hand, Duke relies on EPA's historical application of the PSD rules to clarify any ambiguities in those rules and quotes at length from EPA's Advanced Notice of Proposed Rulemaking – a document that DAQ submitted "does not legally impact DAQ's decision." DAQ Mem. at 26. Finally, DAQ discusses, and relies in part on, several authorities that were nowhere to be found in Deseret, and in fact many of which post-date Deseret. DAQ Mem. at 22-34. With regard to these authorities, DAQ has set forth significant analysis that is new to this discussion. Compare DAQ Mem. at 31-34 (discussing the Delaware SIP and the legal implications thereof in detail) with Duke, Reply in Support of Duke Energy Carolina's Mot. to Dismiss Certain Claims of Pet'rs at 7 n.2 (providing a very brief rebuttal to the Delaware SIP).

[7] DAQ asserted previously that because EPA's rules are clear on their face and the EMC adopted those rules by reference, DAQ's rules are also clear. The Petitioners contend that DAQ is foreclosed from this argument. Pet'rs' Resp. at 12 n.14. For this remarkable proposition, the Petitioners rely on Gonzales v. Oregon, 546 U.S. 243 (2006). Gonzales dealt with an agency's attempt to claim deference when interpreting an ambiguous rule. DAQ is asserting that the rule is clear, so deference is not an issue. Even if the rule were ambiguous, Gonzales held only that an agency's interpretation of a "parroting rule" is not entitled to the extreme deference allowed by Auer v. Robbins, 519 U.S. 452 (1997). However, an interpretation of a "parroting rule" will be upheld so long as it is a "permissible interpretation . . . ." Gonzales, 546 U.S. at 258.

The Petitioners' derisive dismissal of significant DAQ arguments as mere repetition is no more than an attempt to mask the Petitioners' failure (with limited exception) to respond to these substantive arguments on the merits.

B. The Petitioners Fatally Misrepresent DAQ's Plain Language Argument

DAQ previously demonstrated that the plain language of the PSD rules directs that CO_2 is not "otherwise . . . subject to regulation under the Act." DAQ Mem. at 16-19. In response, the Petitioners make two quizzical arguments.

First, the Petitioners claim that DAQ provided no "support" for its plain language argument. Pet'rs' Resp. at 12. DAQ's plain language reading of the PSD rule is based on the text of the rule only. It does not rely on DAQ's (or EPA's) historical practice. No "support" that is extrinsic to the text of the rule or common tools of regulatory construction is needed. Moreover, contrary to the Petitioners' contentions, DAQ's argument is not *post hoc*, see pp. 8-13, supra, and the EAB's alleged refutation of the plain language argument is both legally defective and not precedential in this State. See pp. 4-7, supra; see also p. 14 (4th bullet), supra.

Second, the Petitioners' only argument that directly confronts DAQ's plain reading of the rule relies on a misinterpretation of DAQ's position. DAQ did not, as the Petitioners would have the ALJ believe, argue that category (iv) of the definition of "regulated NSR pollutant" is limited to the precise pollutants already specified in categories (i), (ii), and (iii). See Pet'rs' Resp. at 13. DAQ agrees with

the Petitioners that such an interpretation would be suspect. DAQ argued, quite clearly, that "otherwise," as used in category (iv) means "in a similar manner." See DAQ Mem. at 18. That is, pollutants that fall into category (iv) "share[] the common characteristics" of those in categories (i) through (iii). Id. One of those common characteristics is that the emissions of pollutants in categories (i) to (iii) are all actually limited; those emissions are not just subject to monitoring and reporting requirements. Any broader an interpretation of category (iv) would swallow categories (i) to (iii), rendering them superfluous. Id. at 18-19.

Faced with this compelling argument, the Petitioners now proffer that category (iv) "cover[s] pollutants that, while not subject to current limitations on emissions are nevertheless subject to other Clean Air Act requirements, such as . . . monitoring, reporting and recordkeeping requirements . . . ." Pet'rs' Resp. at 13. What more category (iv) "cover[s]," the Petitioners do not say. If it also covers pollutants that are "subject to current limitations on emissions" then category (iv) is all-inclusive and again swallows categories (i) through (iii). But the Petitioners may intend that category (iv) covers pollutants that are subject ***only*** to "other Clean Air Act requirements, such as . . . monitoring, reporting and recordkeeping requirements . . . ." This interpretation would inexplicably leave out of the PSD program any pollutant that is subject to emission limitations but not expressly

included in categories (i) through (iii), while including in the PSD program pollutants that are not subject to any other emission limitation at all.

On the other hand, DAQ's reading of the rule finds that categories (i) through (iii) provide the necessary contours to define the additional pollutants that are "otherwise . . . subject to regulation . . . ." This ensures that each subdivision of the definition of "regulated NSR pollutant" has meaning and purpose.

CONCLUSION

For all of the foregoing reasons, the motion to dismiss should be granted.

Respectfully submitted, this the 21st day of April 2009.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Respondent DAQ's Reply Memorandum in Support of Motion to Dismiss CO_2 PSD Claim has been served on the following counsel for the parties by first-class USPS mail, postage pre-paid and by electronic mail at the following addresses:

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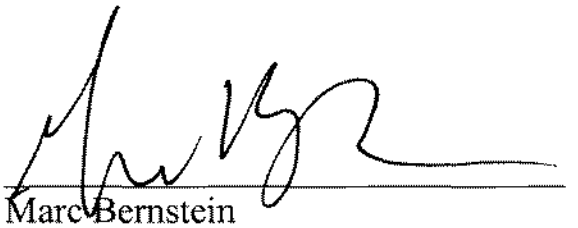

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